United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTONIO FLORES,

Defendant-Appellant

Bp/s

Docket No: 77-1004

APPELLANT'S BRIEF

STUART R. SHAW
ATTORNEY AT LAW
600 MADISON AVENUE
NEW YORK, N. Y. 10022

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Stuart R. Shaw
Attorney for Defendant-Appellant
600 Madison Avenue
New York, N. Y. 10022

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INTRODUCTORY STATEMENT

ANTONIO FLORES appeals from a judgment of conviction entered on November 3, 1976 in the United States District Court for the Southern District of New York after a jury trial before the Honorable Dudley B. Bonsal.

Indictment 73 CR 19 charged defendant Flores with conspiracy to violate narcotics laws under Title 21 U.S. Code Sec. 173 and 174.

Extensive pre-trial proceedings on the issues of extradition and admissability of evidence were conducted and are described in Part A of the Statement of Facts herein.

The defendant's trial commenced on August 17, 1976 and concluded on August 26, 1976 when the jury reached a verdict finding the defendant guilty on counts 1 and 2.

On November 3, 1976, Honorable Judge Bonsal sentenced ANTONIO FLORES to a term of twenty (20) years imprisonment and a fine of $20,000.

NOTE TO THE COURT

Defendant respectfully requests that this Honorable Court take judicial notice pursuant to Rules 28 and 30 of the Federal Rules of Appellate Procedure of all previously filed briefs and exhibits in the instant case including but not limited to Petition for Writ of Mandamus and Exhibits filed by Defendant; Appeal by Government and Appendix, Answering Brief and Appendix of Defendant, Defendant's Motion for Re-Hearing en banc and exhibits, etc. filed under docket no. 76-1195.

STATEMENT OF FACTS

a. History and background of this case.

On January 8, 1973 a warrant of arrest was issued in the United States District Court for the Southern District of New York against Antonio Flores, for the alleged crime of conspiracy to transport and sell narcotic drugs in violation of Sections 173 and 174 of Title 21, United States Code during the period between January 1, 1968 and April 30, 1971, Indictment No. 73CR19. Another warrant of arrest, dated April 5, 1973, had been issued by the Grand Jury of the United States District Court for the Eastern District of New York, for the alleged crime of conspiracy to receive, conceal, buy, sell, and facilitate the transport and concealment of heroin and cocaine, narcotic drugs, after they had been brought illegally to and imported into the United States, which crime was allegedly committed between January 1, and August 31, 1968, according to said indictment.

On March 31, 1973, Flores was arrested in Spain for possession of a small quantity of marijuana and a forged passport. The United States sought Flores' extradition and a hearing was had at Barcelona, Spain, on November 13, 1973 where all parties were duly represented. An extradition hearing was held by a duly constituted Court in Spain, a

three judge panel.

Flores originally opposed extradition before the Spanish Court on the grounds that neither the Extradition Treaty of 1904 nor the Extradition Treaty of May 29, 1970, which was entered into force June 16, 1971 (22 UST 737:TIAS 7136) was applicable to the period of the alleged conspiracy covered in the indictment, namely, January 1, 1968 to April 30, 1971.

The three judge panel that presided over the extradition hearing rendered its decision on November 13, 1973. Presiding Judge Tomas Gonzalez Ramon Fernandez wrote the opinion for the panel of Examining Court No. 6 at Barcelona, Spain. The High Court of Spain held that:

> The defense argument concludes with the statement that at that time neither the (Extradition) Treaty of 1904, nor the Treaty of 1970, now in force, was applicable. With respect to the Extradition Treaty of May 29, 1970, between Spain and the United States of America, in force since June 16, 1971, that statement is correct, and therefore the objection based on the lack of retroactive effects of the said Treaty is pertinent. (See appendix A-78)

The High Court of Spain, also ruled that the Treaty of June 15, 1904 ratified by Spain April 6, 1908, and ammended by the subsequent Convention for the Suppression of Illicit Traffic in Dangerous Drugs, signed at Geneva June 26, 1936 and ratified by the United States in 1947, acquired full force and effect in Spain on September 16, 1970 and was in full force as of September 3, 1970.

The High Court of Spain further ruled that Articles 2 and 9 of the Treaty of 1904 covered any future treaty of extradition between Spain and the United States and, moreover, Article 2 also included 'conspiracy' to commit, inter alia, offenses relating to the traffic of narcotic drugs.

The High Court of Spain granted the United States request for extradition of Flores stating however that it was "expressly limited with respect to time to the acts committed between September 3, 1970 and April 30, 1971 excluding any previous or subsequent acts (emphasis added) and, furthermore, 'it is understood that the extradition is contingent upon the formal promise of the United States Government that the aforsaid person will not be prosecuted for previous offenses foreign to this extradition request unless he expressly consents to such prosecution'. The High Court of Spain further held that:

> "the requested extradition of the aforesaid Antonio Flores is denied with respect to the

claim of Court of the Eastern District of New York and charges brought against him before the Court." (See Appendix, A-76-A83)

Prior, during and subsequent to the above stated Court hearings and/or decision with regard to extradition of Flores, the Government of Spain through its Ministry of Foreign Affairs, on its own initiative, entered into "negotiations" with the United States Embassy. Said negotiations were held to assure Spain, Appellee Flores and his legal representatives that the Spanish Court's decision would be upheld by the Americans. On February 13, 1974, the American Embassy, representing the United States Department of State and Justice Department made a "formal Promise" to the Spanish Government, as required by the Spanish Court. (See Appendix, A-84) Said "formal promise" was relied upon by the Spanish Government, Flores, and his Spanish and American counsel. Said reliance resulted in Flores, on advice of his counsel, electing to waive any further right of appeal in Spain on the issue of extradition.

Prior to the date originally set for trial, Flores moved to suppress as evidence against him any evidence of the acts and declarations of the defendant or his conspirators made prior to the effective date of the treaty, September 3, 1970, or after the end of the conspiracy as alleged in the indictment, April 30, 1971. In a memorandum decision dated

March 24, 1976, and more explicitly at pre-trial conferences held on April 13, April 19, and April 22, 1976, the Court ruled that while statements made by Flores prior to September 3, 1970, would be admissible for the limited purpose of demonstrating Flores' knowledge and intent, statements and acts of co-conspirators prior to that date would be inadmissible.

On April 7, 1976 the Embassy of Spain filed an official letter of protest with the United States Department of State stating that the pre-trial decision violated the extradition agreement entered into by the respective countries. Said letter of protest was received by the United States Department of State on April 8, 1976. (See appendix, A-69-A71)

Defense counsel filed a petition for a Writ of Mandamus before this Honorable Court on April 14, 1976 contesting the trial judge's decision. Said petition was denied on April 23, 1976.

Pursuant to Title 18 U.S.C. sec. 3731, the prosecution filed a direct appeal to this Honorable Court contesting the pre-trial decision of Judge Bonsal. Oral argument was held on June 18, 1976. On July 9, 1976, this Honorable Court stated that

> ...subject to proper jury instructions, the relevant pre-September 3rd acts and statements of both Flores and his alleged co-conspirators are therefore admissible to the extent that they may demonstrate the existence of a conspiracy

continuint into the date limits fixed by the Spanish Court and establish the intent and purposes of the conspirators during that period. United States v. Flores, 538 F. 2d 939, 945 (2nd Cir., 1976)

On September 29, 1976, the Embassy of Spain filed another letter of protest with the United States Department of State which specifically stated that the trial judge's charge to the jury violated the extradition agreement entered into between the respective countries. (See Appendix A-72, A-75)

> ...Spain...is under the obligation to express its concern as to the manner in which the trial of Mr. Antonio Flores was conducted and whose extradition was granted by the judicial authorities of Spain to be tried in the United States of America only for acts committed during the period between September 3 1970 and April 30 1971.
>
> Without considering the discussion of whether the admission by the District Court of evidence concerning Mr. Flores' illegal activities prior to September 3. 1970...would constitute a breach of the extradition agreement...Spain wishes to insist...that the Judge of the Southern District Court...during the trial...contradicts(ed) the terms of the extradition decree of the Audiencia of Barcelona and Verbal Note number 136 of February 13. 1974 of the Embassy of the United States...
>
> ...Spain requests the cooperation of the Department of State to secure the compliance of the above-mentioned decree and verbal note. (See Appendix A72. A73)

b. The Prosecution's Case

EDOUARD RIMBAUD, a published fiction writer (TT-48), convicted swindler and bank robber (TT-48); convicted narcotics conspirator (TT-49), paid government informant (TT-49), and a man who schemed and attempted to smuggle heroin from France to Canada in the soil of the consecrated tombs of Canadian War heroes (TT-275), was the Prosecution's first star witness. Rimbaud was examined through an attractive prosecution interpreter, Joella McCall. (TT-402) Said interpreter was the literary agent and confidant and a close personal friend of Rimbaud. (TT-295) Rimbaud testified to a heroin smuggling conspiracy which commenced in 1968 (TT-46-391). The Prosecutor, through Rimbaud, failed to illicit testimony as to events during the period of the indictment, September 3, 1970 until April 30, 1971 against defendant FLORES.

JEAN RAVENELLO, a French Police Officer for 23 years, testified through the same prosecutor interpreter, Joella McCall, (TT-402) regarding certain French hotel records. None of said records involved any acts during the period of the indictment against FLORES.

TERRY PAUL JONES, a convicted strongarm robber (TT-426, 427) and paid government informant (TT-428) who was offered five thousand dollars ($5,000.00) by the prosecution

to cooperate with the Government against Flores (TT-473), testified about his activities in 1968 (TT-433-436) when he went to Boston to pick up heroin. Jones admitted to smuggling marijuana into California from Mexico in 1968 (TT-451), but Jones did not testify as to any criminal acts during the period of the indictment against the defendant.

ANGEL ROSADO MORALES, a man who "grew up" with the defendant Flores (TT-492) and was involved in legitimate business enterprises with FLORES (TT-493), testified in regard to a trip he and the defendant made to Paris, France in 1968 (TT-496). MORALES testified he knew the defendant as a gambler (TT-502, 503) but gave no testimony as to criminal acts during the period of the indictment.

EDMOND TAILLET, a French entertainer (TT-516) convicted of conspiracy for drug trafficking (TT-516) and a Government informant (TT-517) testified through the Government's interpreter, Joella McCall, concerning a drug smuggling conspiracy of which he was a member (TT-525) beginning in 1968. TAILLET testified that in February, 1971 (TT-619) TAILLET went to Marseilles, France to meet Joseph Mari and Joe Marro to discuss plans to smuggle a French Blue Citroen automobile with one hundred (100) kilograms of heroin to New York. The defendant was alleged to have somehow been responsible to TAILLET for payment for said kilograms. TAILLET testified that the

contraband was to be hidden under the floor of the car in the front and back, under the back seat and in the trunk (TT-621). TAILLET stated that one Etienne Mosca brought the Blue Citroen to New York via Spain, Puerto Rico and Mexico (TT-630) and that Mosca parked the car in the garage of the Penn Garden Hotel in New York (TT-631) when Mosca was a guest in April, 1971 (TT-664).

TAILLET testified to meeting Anthony Segura at the New York Hilton Hotel (TT-668) on April 12 or 13, 1971 to inform Segura of the arrival of the Citroen with one hundred (100) kilograms of heroin inside (TT-669) and to give Segura the parking stubs for the car in the Penn Garden Hotel Garage. TAILLET testified that the next day he met Segura at the Hilton (TT-669) and Segura took TAILLET to a private home where a man was identified to TAILLET as "Antonio", (TT-670). At that point TAILLET testified (TT-670, line 13): "And at that time effectively indeed I recognized Antonio Flores. But he had changed a lot. He had lost weight, he had a little beard, and it seemed that he had had plastic surgery on his face." The government admitted before the Judge only that Flores did not have plastic surgery.

TAILLET, who admitted to lying under oath at all three prior trials he testified in and before each Grand Jury

he testified before. (TT-766) Taillet testified that Segura allegedly inquired as to twenty (20) missing kilograms (TT-671) but agreed to give him the money in an attache case. Segura and TAILLET went to the garage of the Penn Garden Hotel and drove away in the Blue Citroen (TT-672) and later unloaded the heroin from the Citroen. (TT-684) Taillet testified that the Citroen was returned to the Penn Garden and Segura and TAILLET went to TAILLET'S room at the City Squire Hotel where Segura opened his attache case and dumped $370,000. on the bed. (TT-684-685).

KURT BASS testified that he was a New York Citroen automobile salesman. Bass testified that a man and a woman tried to sell him a 1968 Blue Citroen with ripped out floorboards in May of 1971. (TT-891). Bass gave no testimony regarding the defendant.

ROBERT PREZIOSO, an agent of the Drug Enforcement Administration (DEA), testified that on May 7, 1971 he was employed by United States Customs and searched a Blue Citroen (TT-894) provided to him by Kurt Bass. PREZIOSO testified that he found minute traces of a white powder on various parts of the car (TT-899-900). PREZIOSO turned over said white powder traces to the Government's chemist (TT-901).

DR. JAMES CHAP, Chief of the Organic Chemistry branch of the United States Customs Laboratory in 1971, testified that

he tested the white substance found in the Citroen and identified it as heroin hydrochloride (TT-922). DR. CHAP admitted to finding only ten micrograms of heroin hydrochloride, a very minute speciman. CHAP said that one milligram would be one thousand micrograms (TT-923).

JUAN ALVARA LARA, a police inspector in Barcelona, Spain, testified that he arrested FLORES in Spain on March 23, 1973 (TT-943 (TT-943). LARA gave no testimony as to acts of FLORES during the period of the indictment. LARA'S entire expenses in coming from Spain to the United States were borne by American taxpayers. LARA testified against the wishes of the Spanish Government.

JOSE L. CANO, a police inspector in Barcelona, Spain, testified that he arrested the defendant in Spain on March 23, 1973 (TT-958). CANO gave no testimony as to acts of FLORES during the period of the indictment. CANO testified against the wishes of Spain and he too was provided transportation, etc. at a cost to the United States taxpayers. The only contraband placed into evidence in the case by the government was the vial with the ten micrograms of heroin.

c. Defendant's Case

GEORGE ALVAREZ

The first of two witnesses called by the defense was George Alvarez. Alvarez, a plumber, testified that he is the uncle of Antonio Segura. In addition, Alvarez testified that he was indicted for conspiracy to violate narcotics laws in the same alleged conspiracy that Flores was charged with (TT-1058) and that he was acquitted when Government Informant Taillet changed his testimony to recant an eye-witness identification of Alvarez (TT-1058). Alvarez testified that the last time he saw Flores was in 1949 or 1950 when Flores was a boy and that Flores never came to his house or hid heroin in his house as Taillet testified and that no heroin was ever hidden in his home as Taillet testified (TT-1060).

ANTONIO SEGURA, an alleged co-sonspirator with FLORES (TT-1067) testified that he was presently incarcerated (TT-1068) for narcotics conspiracy and escape convictions. Segura testified that he saw Flores in Paris, France during the Summer of 1971.

Segura testified that he was convicted for narcotics conspiracy to import heroin into the United States but that FLORES was not a part of said conspiracy to import narcotic drugs (TT-1074).

POINT 1

THE DISTRICT COURT LACKED THE REQUISITE JURISDICTION TO TRY THE DEFENDANT FOR CRIMES OTHER THAN THOSE SPAIN AND HE UNITED STATES AGREED UPON BEFORE DEFENDANT'S EXTRADITION

a) EXTRADITION OF THE DEFENDANT

On December 7, 1973 the High Court of Spain proclaimed its decision on the issue of the extradition of Antonio Flores from Spain to the United States. (See Appendix A76-A83) The Spanish High Court ruled that the Extradition Treaty of 1904 between the United States and Spain was supplemented by Articles 2 and 9 of the Geneva Convention for the Suppression of Illicit Traffic in Dangerous Drugs. The "entry into force" in Spain on September 3, 1970 (see Appendix, A78-A79) of said treaty governed the decision of the High Court of Spain and the instant case under the Doctrine of Specialty, United States v. Raucher, 119 U.S. 407 (1886).

The High Court of Spain specifically held,

> The extradition of Antonio Flores, also known as Antonio-Javier Flores Serrano, who uses the name of Luis Serrano Flores as well, a United States citizen born in Caguas, Puerto Rico, in 1937, is admissible, and his extradition is granted, at the request of the United States of America, limited solely and exclusively to the alleged crime of conspiracy to violate Sections 173 and 174 of Title 21 of the United States Code, of which crime he is accused before the Court of the Southern District of New York, and further expressly limited with respect to time to the acts committed between September 3, 1970

and April 30, 1971, excluding any previous or subsequent acts. The person named should be delivered up to the requesting country and remain subject to the competent court, and it is understood that the extradition is contingent upon the formal promise of the United States Government that the aforesaid person will not be prosecuted for previous offenses or offenses foreign to this extradition request unless he expressly consents to such prosecution. (See Appendix, A82) (emphasis added)

Prior, during and subsequent to the above-stated Court hearings and/or decision with regard to extradition of Flores, the Government of Spain through its Ministry of Foreign Affairs, on its own initiative, entered into "negotiations" with the United States Embassy. Said negotiations were held to assure Spain, Appellant Flores and his legal represantatives that the Spanish Court's decision would be upheld by the Americans. On February 13, 1974, the American Embassy, representing the United States Department of State and Justice Department made a "formal Promise" to the Spanish Government, as required by the Spanish Court. (See Appendix, A-84) Said "formal promise" was relied upon by the Spanish Government, Flores, and his Spanish and American counsel. Said reliance resulted in Flores, on advice of his counsel, electing to waive any further right of appeal in Spain on the issue of extradition.

The United States government formally promised the Spanish Government that Flores would not be prosecuted "for prior infractions or infractions different than those" referred

to in the decision of the Spanish Court. (See Appendix, A84) In substance said promise qualified the terms of the extradition of Flores. The American Embassy in Spain, with the acquiescence of the United States Justice Department, guaranteed Spain that Flores would be tried only for "acts" falling within a specific period of time, September 3, 1970 to April 30, 1971 and conversely that Flores would not be tried for acts falling outside said specific period of time. The Americans, in effect, assurred the Spanish Government that they could and would convict Flores even if limited to said period September 3, 1970 to April 30, 1971 and only try Flores for "infractions" falling within said period of time.

b) ARTICLE VI OF THE UNITED STATES CONSTITUTION DICTATES THAT THE AMERICAN GOVERNMENT MUST LIVE UP TO ITS TREATY COMMITTMENTS AS THE HIGHEST LAW OF THE LAND, SUBSEQUENT TREATIES ENTERED INTO BY THE AMERICAN GOVERNMENT, EXCHANGE OF NOTES, AND VERBAL AGREEMENT(S) BIND THE UNITED STATES UNDER THE DOCTRINE OF "PACTA SUNT SERVANDA."

The court should not forget that Spain and the United States (representing the Dept. of State and Justice Dept.), and Flores' attorneys in Spain, negotiated the formal promise

(Appendix, A84) which further clarified the ruling of the High Court of Spain and the terms of extradition. The United States further agreed to abide by the High Court of Spain's ruling which took into account evidentiary problems. The United States said, in effect, we have no problem with getting a conviction on Flores if we are held to acts or things that allegedly took place between September 3, 1970 and April 30, 1971. The court should take note of the important fact that no where is the word crimes utilized, only the word acts.

"Article 55 of the International Law Commission's draft on the "Law of Treaties" specified (under the heading "Pacta Sunt Servanda") that a treaty in force is binding upon the parties to it and must be performed by them in good faith."

> "The I.L.C. Commentary on Article 55 explains: 'Pacta sunt servanda --- the rule that treaties are binding on the parties and must be performed in good faith --- is the fundamental principle of the law of treaties.' U.N. Doc. A/CN. 4/L. 106/Add. 3, July 17. 1964.
>
> "Each State has a legal duty to carry out in full good faith its obligations under International Law and it may not invoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty."
>
> The International Law of the Future: Postulates Principles and Proposals (Carnegie Endowment for International Peace, 1944) 42; 38 Am. J. Int'l. Supp. (1944) 41, 73.

> The Charter of the Organization of American States, approved at Bogata in 1948, provides (Article 14):
>
> "Respect for and the faithful observance of treaties constitute standards for the development of peaceful relations among States..."

U.S. TIAS 2361; 2 UST 2394, 2419

> "The Duty to Abide by Treaty Obligations. Treaties, like custom, are law-creating facts and are binding upon the contracting parties. Thus one of the most ancient principles of International Law is pacta sunt servanda.'

Svarlien, An Introduction to the Law of Nations (1955) 131.

> "But pacta sunt servanda has a narrower meaning, namely, that agreements (including everything from verbal arrangements and exchanges of notes to the most formal treaty) must be observed. Now, this is a specific rule forming part of the alleged international legal order...."

Corbett, Law and Society in the Relations of States (1951) 73. See.5 International Law Whiteman pp. 220-224.

Under the doctrine of "abuse of rights (abus de droit) which is a recognized principle of International Law, (5 Digest of International Law p. 224), "a fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right prohibited by law." Id. at 225.

It is respectfully submitted that an "abus de droit" exists at present in the instant case in that the District Court and United States Attorney violated the decision of the High Court of Spain, on Extradition and or abrogated the 'formal promise' entered into by the United States with Spain. This Honorable Court is bound by International Law, and the United States Constitution (Act. VI clause 2) to deny the Southern District Court jurisdiction to try Appellant for acts falling outside of the period of limitation decreed by the Spanish Court in its decision (9/3/70-4/30/71) and/or to enforce the terms of said 'formal promise' by denying said District Court jurisdiction in order to prevent a violation of International Law.

c) THE DECISION OF THE HIGH COURT OF SPAIN ORDERING DEFENDANT'S EXTRADITION AND THE FORMAL PROMISE ENTERED INTO BY THE UNITED STATES AND SPAIN WAS VIOLATED BY THE UNITED STATES WHEN THE DEFENDANT WAS TRIED FOR CRIMES OTHER THAN THOSE FOR WHICH HE WAS EXTRADITED.

The Second Circuit Court of Appeals acknowledgedthat international law dictates the acceptance of the High Court of Spain's decision of extradition. United States v. Flores 538 F.2d 939 (2nd Cir. 1976) However, this court erroneously ruled that the decision of the Spanish Court would not be violated if the relevant pre-September 3rd acts and statements of both Flores and his alleged co-conspirators were admitted

at trial for limited purposes only. United States v. Flores, supra, at 945.

The court opinion relied on the oral representation by the prosecutor at the argument of the pre-trial appeal that the Spanish Government had not sent letters of protest to the United States Department of State. Id, Footnote 4. Defense Counsel submitted in his Appendix at the pre-trial appeal argument two letters from the Spanish Counsel General in New York to prove that letters of protest had in fact been written. (See Appendix, A85, A86) These were the only documents in the possession of defense counsel at the time of the pre-trial appeal. However, the United States Department of State had received an official letter of protest from the Government of Spain on April 8, 1976. (See Appendix A70-A71)

On June 18, 1976, the prosecutor made an oral representation to this Honorable Court denying that the United States Department of State received formal notes of protest from Spanish authorities.* United States v. Flores, supra, at 945, footnote 4. Subsequent to the trial below and after translating and reviewing the entire trial transcript, the Embassy of Spain issued another formal letter of protest dated September 29, 1976, which specifically quoted certain prejudicial language in the judge's charge to the jury. (See appendix A72-A73) Defense Counsel did not receive copies of either of these official

* Please see Point III(e).

letters of protest until February 17, 1977. (See letter from Spanish Embassy, Appendix, A69)

The importance of official letters of protest cannot be underestimated. In Fiocconni v. Attorney General, 462 F.2d 475 (2nd Cir., 1972), cert. denied, 409 U.S. 1059 (1972), Italy, on the basis of comity, extradited persons who were indicted in the District of Massachusetts on the charge of conspiracy to import heroin from September 15, 1968 through April 22, 1969. Italy's order of extradition was limited to the aforementioned charge in Massachusetts only. The defendant's in Fiocconni were subsequently indicted and convicted in the Southern District of New York of conspiring to violate narcotics laws from January 1, 1970 through January 4, 1972 also involving two substantive offenses in May, 1970. The denial of the defendant's petition for a writ of habeas corpus in Fiocconni was affirmed. Chief Judge Friendly wrote that,

> ...in the absence of any affirmative protest from Italy, we do not believe that Government would regard the prosecution of Fiocconni and Kella for subsequent offenses of the same character as the crime for which they were extradited as a breach of faith by the United States. Id, at 481 (emphasis added)

In United States ex. rel. Lujan v. Gengler, 510 F.2d 62 (2nd Cir., 1975), cert. denied, 95 S. Ct. 2400 (1975), A Federal prisoner petitioned for writ of habeas corpus seeking release from confinement on grounds that his abduction in Bolivia and subsequent placement on plane bound for New York

violated due process thereby precluding federal courts from asserting jurisdiction over him.

In affirming the denial of the petition Chief Judge Kaufman stated:

> ...Lujan fails to allege that either Argentina or Bolivia in any way protested or even objected to his abduction. This omission is fatal to his reliance upon the charters (of the United Nations). Id., at 67)

The instant case is clearly distinguishable from Fiocconni and Lujan. The Government of Spain has twice formally protested the conduct of the United States, as evidenced by the official letters of formal protest.

The law is clear that an extradited defendant may not be charged and tried for crimes not enumerated in the applicable extradition treaty. United States v. Rauscher, 119 U.S. 407, (1886). Even if the treaty specifies crimes for which the defendant may be criminally responsible prosecution for such offenses will be barred if the asylum state did not grant extradition for such crimes. Johnson v. Browne, 205 U.S. 309 (1907)

There is no need to surmise whether the Government of Spain considers the pre-September 3rd acts as separate offenses. See, e.g. United States v. Paroutian, 299 F.2d 486 (2nd Cir. 1962) because of the aforementioned formal protests of Spain.

The Government of Spain has spoken in unmistakably clear language. It is the position of the Spanish Government that Flores was tried and convicted for offenses other than those for which he was extradited. (See p. 7 supra; App. A69-A75)

The principle of specialty requires this Honorable Court to defer to the language of the Spanish letters of protest, and dismiss the case against Flores.

> The "principle of specialty" long recognized in international law provides that "the requisitioning state may not, without permission of the asylum state, try or punish the fugitive for any crimes for which he was extradited." Friedmann, Lissitzyn & Pugh, International Law 493 (1969); see generally 1 Moore, Extradition 194-259 (1891). Shapiro v. Ferrandina 478 F.2d 894-905 (2nd. Cir. 1973)

The principle of specialty has been viewed as a privilege of the asylum state, designed to protect its dignity and interests. Id. at 906.

The dignity and interests of Spain and Flores have been abused and insulted by the manner in which Antonio Flores was tried and convicted in violation of the decision of the Spanish High Court and the formal promise of the United States. An individual who is extradited to this country

> shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up; and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition. United States v. Rauscher, supra, at 424.

POINT II : THE FAILURE OF THE TRIAL JUDGE TO PROVIDE PROPER LIMITING INSTRUCTIONS TO THE JURY PURSUANT TO THE ORDER OF THE COURT OF APPEALS EFFECTIVELY DENIED THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

In United States v. Flores, 538 F2d 939 (2nd Cir. 1976) the Second Circuit Court of Appeals decided that the Prosecution could offer evidence of alleged criminal acts both before and after the period of the indictment, September 3, 1970 to April 30, 1971, for a limited evidentiary purpose.

In United States v. Flores, supra, at 945, the Court concluded:

> Subject to proper jury instructions the relevant pre-September 3rd acts and statements of both Flores and his alleged co-conspirators are therefore admissible to the extent that they may demonstrate the existence of a conspiracy continuing into the date limits fixed by the Spanish Court and establish the intent and purposes of the conspirators during that period.

In footnote 4, United States v. Flores, supra, at 945 the Court stated:

> We have no doubt that in his instructions to the jury the able trial judge will, to the extent required, clearly advise the jury of the significance of the distinction between evidence of any earlier conspiracy and the offense charged against Flores. (emphasis added)

At trial, the defense raised twenty-one (21) requests for instructions to the jury to consider prior act evidence for its limited evidentiary purpose only. (TT 115-117; TT 120, TT 433, TT 526; TT 565; TT 570; TT 587; TT 939; TT 943, line 7, TT 943 line 14; TT 943, line 17; TT 943 lines 21-23; TT 946; TT 948; TT 960 TT 967; TT 968; TT 1055; TT 1088 and TT 1178.)

The Prosecution's first four witnesses (TT 46-512) did not testify to any alleged criminal acts during the September 3, 1970 to April 30, 1971 period of the indictment. However, during this highly prejudicial testimony the trial judge gave only one limiting instruction to the jury:

> You remember I told you yesterday that when the trial is over and you deliberate here, that you would focus on the dates as to whether there was a conspiracy here and whether the defendant Flores was a member of it in the period between September 3, 1970 and April 30, 1971.
>
> I just want to mention to you so far the testimony we have heard from Mr. Rimbaud deals with facts in '68 and '69. This is background information, which I will instruct you about at the time of the charge; that the crime for which Mr. Flores is charged here, this conspiracy is for this later period, September 3, 1970 to April 30, 1971. (TT 122)

In effect this 13 line limiting instruction in the middle of testimony only after a request by defense counsel, was used to caution a jury which heard over 700 pages of testimony as to an alleged narcotics conspiracy prior to the dates set by the indictment. It is respectfully submitted that such a limited instruction effectively denied the defendant's right to a fair trial.

This limiting instruction (TT 122) was the trial judge's only attempt to comply with the order of the Second Circuit Court of Appeals during the trial. It is respectfully submitted that this attempt was an insufficient limiting

instruction and effectively denied the defendant his right to a fair trial.

> An item of evidence may be logically relevant in several aspects, as leading to distinct inferences or as bearing upon different issues. For one of those purposes it may be competent, but for another incompetent. In this frequently arising situation, subject to the limitations outlined below, the normal practice is to admit the evidence. The interest of the adversary is to be protected, not by an objection to its admission, but by a request at the time of the offer for an instruction that the jury is to consider the evidence only for the allowable purpose. (Wigmore, Evidence sec. 13; McCormich, Evidence sec. 59. (ed. 19)

When the judge instructs the jury to consider the evidence solely for its legally competent purpose, the objecting party is protected from the specific prejudice which would otherwise require the exclusion of the evidence. Shepard v. United States, 62 F. 2d 683 (10th CIR. 1933; Michelson v. United States, 335 U.S. 469, 486 (1948); Awkard v. United States, 352 F.2d 641, 646 n. 13 (D.C. CIR. 1965).

The limiting instruction has been characterized as a judicial "placebo", by the Honorable Justice Learned Hand, Nash v. United States, 54 F. 2d 1006 (2nd CIR. 1932) but others state that limiting instructions are one of the expressions of trust, Courts place in the jury system. Justice Burton in Delli Paoli v. United States, 352, U. S. 232, 242 (1957) said:

> It is a basic premise to our jury system that the Court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the Court's instructions...the jury system makes little sense.

An example of proper limiting jury instructions is United States v. Stassi, 544 F. 2d 579 (2nd CIR., 1976).

In United States v. Stassi, supra, the indictment charged a conspiracy running from 1970 to 1972 and the District Court Judge permitted the introduction of evidence of narcotics related transactions occurring in 1973. Such testimony is admissible when probative of the existence of the conspiracy charged or the participation of the alleged conspirator. United States v. Nathan, 476 F. 2d 456, 460 (2nd CIR. 1973), Cert. Denied, 414 U.S. 823 (1973); United States v. Miranda, 526 F. 2d 1319, 1331 (2nd CIR. 1975), Cert. denied, 97 S. Ct. 69 (1976).

The conviction in United States v. Stassi, supra was affirmed because:

> Judge Knapp emphasized time and again that he was admitting the disputed testimony for the limited purpose of establishing the association of the parties. See United States v. Diggs, 497 F. 2d 391, 394 (2nd CIR. 1974), cert. denied, 419 U.S. 861 (1975).
>
> He also instructed the jury that the defendants were being tried only for the conspiracy charged in the indictment and that, if the jurors had a reasonable doubt as to the defendants' guilty, they were to acquit, even though they were "dead certain" that defendants had committed some other crime. United States v. Stassi, supra at 583.

In the case at bar, there can be no doubt of the substantial deprivation of the defendant's right to a fair trial. The great prejudice and confusion caused by similar crime evidence was not balanced by proper limiting instructions as in United

States v. Stassi, supra.

In the District Judge's charge to the jury, the sum total of instructions that were given as to the permissible scope of the indictment covered twenty (20) lines (TT 1193; TT 1194; TT 1196; TT 1201; TT ;203 and TT 1213). However, not once in this brief instruction did the District Judge attempt to explain to the jury the limited evidentiary value of prior act testimony. United States v. Fino, 478 F. 2d 35, 38 (2nd CIR. 1973) cert. denied 417 U.S. 918 (1974). It is respectfully submitted that such a brief instruction buried in a thirty-three (33) page charge to the jury is insufficient and does not fulfill the directions of the Second Circuit Court of Appeals. The District Judge's charge to the jury failed to:

> clearly advise the jury of the significance of the distinction between evidence of any earlier conspiracy and the offense charged against Flores.
>
> United States v. Flores, supra, at 945 n. 5.

It is respectfully submitted that a careful viewing of the totality of the trial judge's charge to the jury on the critical issue of the effective dates of the indictment, namely September 3, 1970 to April 30, 1971 reveals that said charge was extremely confused and requires that the instant case be set down for a new trial. The trial judge emphasized certain acts in 1968 and 1969 when he marshaled the evidence even

though said dates fell outside the purview of the Second Circuit Court ruling on permissable scope of the trial. (TT. 1185, 1187, 1188, 1189) It is clear that the trial judge seriously prejudiced the defendant and irreparably confused the jury when he erroneously stated:

> It is my recollection the Government contends that the Defendant Flores was a member of a conspiracy to import heroin from France into the United States between January 1968 and April 30, 1971. (emphasis added)

This error was compounded when the trial judge began to read the indictment, and referred to the critical dates as "the first day of January 1968 and continuously thereafter up to and including the 30th day of April, 1971." (TT-1191)

Furthermore, on at least three separate occasions in his charge, Judge Bonsal emphasized the importance of finding the defendant a member of a conspiracy after September 3, 1970. (TT-1196, 1203, 1213) However, there was no mention of the limited relevance of evidence of membership in a conspiracy prior to September 3, 1970 or subsequent to April 30, 1971.

Defense counsel timely and properly objected to the manner in which the trial judge marshaled the evidence (TT-1214) and the prejudicial use of dates prior to September 3, 1970. (TT-1217, 1218)

The prosecutor also admitted that the charge to the jury was defective.

> MR. FLANNERY: Your Honor, there is only one matter and that is I didn't think it was clear that they could consider the existence of the conspiracy prior to September 3, 1970. (TT-1217)

The confusing effect of the trial judge's charge was clearly established when the jury sent a note to the judge. (TT-1238, see appendix, A58) This note asked the following question:

> Could you please reread the part of Segura's testimony where he was asked if he went to France to meet Flores in the cross-examination?
>
> (TT-1238)

This meeting that the jury was concerned about occurred in late May or early June of 1971, (TT-1079) which was clealy outside the scope and time period of the indictment. The trial judge did not instruct the jury at thatcrucial time of the limited purpose for which such evidence could be used.

Furthermore, it is respectfully submitted that the trial judge misread the record in his attempt to answer the jury's note. In an effort to respond to the jury, the trial judge decided to read certain passages from page 1082 of the record. The confusion felt by the jury can be clearly determined by reading the judge's instructions in toto. (TT-1240-1244, Appendix A60-A64)

A careful reading of page 1082 of the trial transcript reveals the following testimony that was read by the judge to the jury:

Q. How many other names did you use besides Segura--I'm sorry, besides Valentin?

MR. SHAW: Objection.

Q. That is the only one you used that one time you went to Paris to meet Flores?

A. That is true.

In his attempt to respond to the jury's note, the judge read the above testimony on at least two separate occasions, but omitted to read the objection of defense counsel. (TT-1240, 1242) Said omission, and the reading on two separate questions combined into one, could only have resulted in confusing the jury. It should be noted that the judge then had the court reporter read the same testimony (approximately nine times in all) to the jury each time omitting the objection of defense counsel, thereby compounding the individual juror's confusion on what was obviously a crucial and pivotal point in their deliberations.

Subsequent to the reading of the aforementioned testimony of the witness, Segura, an off the record conference was held in Judge Bonsal's chambers, attended by the prosecutor, defense counsel, and his legal assistant, Ms. Dorothea Constas. At this conference, Judge Bonsal admitted that he should have

instructed the jury that the aforementioned portion of Segura's testimony fell outside the limits of the indictment and that he would do so at the next opportunity. However, the Judge could not correct the error and instruct the jury properly because word arrived in chambers that the jury had reached a verdict. (TT-1245) Post-trial interviews conducted with members of the jury by defense counsel's legal assistant, Ms. Dorothea Constas, revealed that at least two jurors convicted FLORES solely on Segura's "outside the indictment" testimony, and a third juror convicted Flores based on the aforementioned irrelevant testimony of Segura and also the perjured testimony of Jones. Jones' testimony also fell outside the purview of the indictment (September 3, 1970 to April 30, 1971).

It is respectfully submitted that all of the above-mentioned factors resulted in severe prejudice to Flores. The law in this circuit is clear that an improper charge must lead to a reversal under the circumstances presented herein.

> The purpose of a charge is adequately, yet succinctly, to instruct the jury as to its function, which is the independent determination of the facts, and the application of the law, as charged by the court, to the facts, as found by the jury.
> United States v. Persico, 349 F.2d 6,8 (2nd Cir., 1965)
>
> (Conviction reversed because of improper charge to the jury); see also, United States v. Barry, 518 F.2d 342, (2nd Cir., 1975)
> (conviction reversed because of improper charge to the jury);
> United States v. McCracken, 488 F.2d 406 (5th Cir., 1974, (conviction reversed because of improper charge.)

POINT III

THE MISCONDUCT OF THE PROSECUTOR

REQUIRES REVERSAL AND A NEW TRIAL

a) THE PROSECUTOR IMPROPERLY PLACED THE DEFENDANT'S CHARACTER IN EVIDENCE.

During the trial, the Prosecutor elicited testimony from several witnesses which improperly placed the defendant's character in evidence and issue. For instance, the Prosecutor questioned Rimbaud on a matter not within the period of the indictment:

> Q. Please continue, Mr. Rimbaud.
>
> A. So, Flores told me that if I thought he had double crossed us, that he could get a Puerto Rican to cut Gillert's throat.
>
> MR. SHAW: Objection, your honor, I respectfully suggest that this is improper. (TT-82)

On his summation the Prosecutor continues his attack on the defendant's character repeating the above-noted question and answer (TT-82) but failed to read defense counsel's objection (TT-1112)!

The Prosecutor said:

> "The only thing he wanted when he first came to the Government was protection from that man, Antonio Flores." (TT-1123)

Further, at TT-1124 line 12, the Prosecutor added: "Flores threatened Jones and so it was after that that Jones copied an affidavit..."

A similarly outrageous remark by the Prosecutor came at TT-1132: "And even today when he took the stand today he is still protecting his boss Antonio Flores and you can ask yourself why and you can see what happened to others that bucked Antonio Flores."

Further evidence of prosecutorial misconduct came in putting the defendant's character in evidence when the Prosecutor during the summation (TT-1118 and 1120) and in his opening statement (TT 21, 25) referred to the "French Connection".

Such reference to the oscar award winning film that grossed millions of dollars in nationwide theatre distribution and was shown to over forty (40) million American viewers on prime time television had the two-fold effect of putting the defendant's character in evidence and mislead and inflamed the jury as part of a pattern of improper prosecutorial conduct.

As a general rule, evidence of other crimes of an accused may not be introduced where the relevancy of such evidence serves solely to show the defendant's bad character or criminal

propensities. Michelson v. United States, 335 U.S. 469 (1948).

In the case at bar, the Prosecutor violated Federal Rules of Evidence, Rule 404(a) 1 by introducing the defendant's character into evidence before the defendant offered it by referring to violent acts. The Prosecutor's motives in introducing the defendant's alleged violent propensities were exposed at the defendant's Sentencing Hearing (hereinafter referred to as SH) on November 3, 1976 ending any possibility of doubt as to his intent at trial.

The Prosecutor implicated the defendant in several violent acts including homicide which the Prosecutor had previously orchestrated during his direct examination and summation. (SH 7) In fact, the safety of the witnesses against FLORES which the Prosecutor argued was in doubt, is proven by their presence on the streets of New York City (Sh 18).

b) THE PROSECUTOR IMPROPERLY INSINUATED CORRUPTION ON THE PART OF DEFENSE COUNSEL.

During summation the Prosecutor said:

"His uncle, Horatio Quinones is just one of several lawyers in this case who hires himself out to do Flores' bidding, however illegal. Jerry Feldman, Howard Diller, other corrupt attorneys, we will talk more about them later." (TT-1118) (emphasis added)

The attorneys referred to by Assistant United States

Attorney Flanney, Feldman and Diller, were in fact Flores' attorneys prior to trial. In fact, Mr. Diller appeared in the Court Room during the trial, on the defense and immediately before Mr. Flanney's summation.

The Prosecutor's reference to "other corrupt attorneys" was deliberate and had the sole effect of casting doubt on the integrity of the defendant's attorney.

Further, at TT-1124, the Prosecutor remarked:

> "Flores threatened Jones, and so it was after that that Jones copied an affidavit drafted by another attorney who thought more of Flores' money than he did of his oath to uphold the law."

In United States v. Burse, 531 F. 2d 1151 (2nd Cir. 1976) reversal was required after the Prosecutor made improper and potentially derogatory comments about Burse's attorney.

In the case at bar the Prosecutor's invidious comments tainted defense counsel and thereby deprived the defendant of his constitutional right to a fair trial.

As the Court stated in United States v. Burse, supra at 1155:

> It should go without saying that successful - even zealous prosecution does not require improper suggestions, insinuations and especially ass rtions of personal knowledge. (citation omitted)

The derogation of defense counsel continued at FLORE'S sentencing hearing (SH 7) but was refuted by defense counsel (SH-14-15) by the revealation that the suspected "corrupt" attorney was himself a former Bureau of Narcotics and Dangerous Drugs Agent. Such was the overzealousness of Mr. Flanney that he attacked his own former associates; unfortunately, the jury was not privy to said facts.

A United States Attorney represents the legal authority of the United States; because of this he bears a greater responsibility than counsel for an individual client. Berger v. United States, 295 U.S. 78, 88 (1935).

In Berger v. United States, supra, the judgement convicting defendant for conspiracy was reversed because of prosecutorial misconduct. Mr. Justice Sutherland, in his opinion, stated as follows:

> The United States Attorney is the representative, not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. 295 U.S., at 88.

In the case at bar, the conduct of the Assistant United States Attorney clearly fell far short of the standards set forth in Berger v. United States, supra.

c) THE PROSECUTOR IMPROPERLY FAILED TO DISCLOSE TO THE DEFENDANT THE BUSINESS RELATIONSHIP BETWEEN THE INTERPRETER, JOELLA McCALL, AND THE WITNESS, EDOUARD RIMBAUD.

Joella McCall was sworn as the official French interpreter (TT-46) for the testimony of Edouard Rimbaud. There were constant problems with McCall's translation (TT-106, 107, 123, 127) and only upon cross-examination by defense counsel did Rimbaud (TT-293-303) admit to a personal and business relationship with the interpreter.

> The witness (Rimbaud): There cama a time when I received from Mrs. McCall the copy of a letter that she had written to the Parole Board. She is not a literary agent. She was acting as my literary agent." (TT-295)

Prosecutorial misconduct may take various forms. One form of misconduct has consisted of non-disclosure by the prosecution. United States v. Seijo, 514 F.2d 1357, 1364 (2nd Cir. 1975); United Stated v. Sperling, 506 F.2d 1323, 1332

(2nd Cir. 1974); United States v. Pacelli, 491 F.2d 1108, 1119 (2nd Cir. 1974).

In United States v. Pacelli, supra, this Court held that the failure of the government to furnish defendant with a letter written by an accomplice who had testified to the United States Attorney, was a prejudicial error, despite the fact that appellant's counsel possessed an abundance of impeaching evidence.

The failure of the Prosecution to disclose Ms. McCall's relationship to Rimbaud falls within the purview of Brady v. Maryland, 373 U.S. 83 (1963).

> The suppression by the Prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, supra at 87.

The relationship between Rimbaud and McCall affected the reliability of both the witness and the interpreter and therefore was determinative of innocence or guilt in the trial.

> New trial is required if the false testimony could...in any reasonable likliehood have affected the judgment of the jury...
>
> Giglio v. United States 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264, 271 (1959).

Appellent respectfully submits that by consciously or subconscious persuasion, Ms. McCall interpreted favorably for Rimbaud. She smiled and laughed away his errors, charmed the

jury, "colored" her interpretation of his answers, etc. The only cure for such error would have been to have had Ms. McCall disqualified from the first. Cross examination, no matter how skillfully utilized, could not undo the irreversible harm caused by favoritism to Rimbaud and the entire prosecution's case.

d) THE PROSECUTOR MADE AN IMPROPER AND PREJUDICIAL STATEMENT TO THE PRESS

On August 26, 1976, the New York Daily News contained an article about the instant case. This article appeared in the newspapers just prior to the commencement of the jury's deliberations. The following objection raised by defense counsel is illustrative:

MR. SHAW: Your Honor, I just draw your attention to the fact that in today's Daily News, Thursday, August 26, is an article about the case and it says Assistant United States Attorney John P. Flannery made the statement during the Manhattan Federal court trial of Antonio Flores, 38, and the statement they say is "U.S. calls drug defendant a killer," and it says here, "The man who allegedly was caught with $65 million in narcotics that became the French Connection drugs was described by the Federal prosecution yesterday as a killer who thought nothing of having an associate's throat slit when a drug deal failed to go as planned."

I again most strenously object to the comment by Mr. Flannery.

THE COURT: All right. You made your objection.

MR. SHAW: And I ask again that your Honor caution the jury not to look at the paper.

THE COURT: I don't think I will now. Sorry, but if you had commented earlier I would have done that earlier, but now they are charged and deliberating. (TT-1222)

This intensely prejudicial statement made by the prosecutor to the Daily News reporter who was covering the trial symbolized his disregard for his office and his willingness to go to any length to unfairly influence the jury.

Section 4.1 of the American Bar Association Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press was approved in 1968, and is relevant here. In pertinent part, section 4.1 states as follows:

> 4.1 Limited use of the contempt power.
>
> It is recommended that the contempt power should be used only with considerable caution but should be exercised under the following circumstances.
>
> (a) Against a person who, knowing that a criminal trial is in progress or that a jury is being selected for such a trial:
>
> (i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, that is wilfully designed by that person to affect the outcome of the trial, and that seriously threatens to have such an effect; or
>
> (ii) makes such a statement intending that it be disseminated by any means of public communication.

The highly inflammatory nature of the prosecutor's statement violated Ethical Consideration 7-13 of the Code of Professional Responsibility.

> EC 7 - 13. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

e) THE PROSECUTOR MADE A MISREPRESENTATION TO THIS HONORABLE COURT DURING ORAL ARGUMENT OF THE PRE-TRIAL APPEAL.

The type of blatant misconduct on the part of the Prosecutor that permeated the trial below unfortunately occurred before this Honorable Court during oral argument of the pre-trial appeal on June 18, 1976. The Prosecutor orally represented to this Honorable Court that the United States Department of State did not receive formal notes of protest from the Spanish authorities.

The letter of protest from the Embassy of Spain, dated April 7, 1976 was received by the United States Department of State on April 8, 1976 at 3:49 p.m., more than two months prior to said oral argument. (Please see stamp of State Department on top of Appendix, A-70).

This Honorable Court was obviously duped by the Prosecutor's misrepresentations when it wrote "The Government... denied that the State Department has received formal notes of protest from Spanish authorities. We are inclined to accept this representation by the Government..." United States v. Flores, supra, at 945, footnote 4.

It is respectfully submitted that this open and cunning deception insulted the integrity of the Government of Spain, of Mr. Flores and his family, and of defense counsel. His actions blemish the character and dignity of the good office he works for and should not be condoned by this court. Said action, standing alone, must result in a Finding by this court of reversible error.

POINT IV: THE TRIAL COURT ERRED IN PERMITTING JOELLA McCALL TO ACT AS AN INTERPRETER IN THE DEFENDANT'S TRIAL

In the case at bar Joella McCall was sworn as the official French interpreter (1146) for the testimony of Edward Rimbaud. An attractive woman (TT 402), Ms. McCall had numerous problems with the interpretation (TT 54, 84) and the allegations of "editorializing" by the interpreter were raised (TT 106, 107). In addition several jurors had difficulty hearing the interpreter (TT123) and several further objections were made to the interpretation (TT 127-129) which let the prosecutor to say:

> "Your Honor, if the interpreter is going to be continually challenged, why don't we have another interpreter"
>
> (TT127)

Further it was disclosed only upon cross examination (TT 293-303) that the Prosecution's star witness Rimbaud had a close personal and "business relationship" with the interpreter (TT 293).

> The witness (Rimbaud): There came a time when I received from Mrs. McCall the copy of a letter that she had written to the Parole Board. She is not a literary agent. She was acting as my literary agent. (TT 295)

One's competency and qualifications as an interpreter is a matter resting largely in the discretion of the trial judge. While it is no doubt desirable that the interpreter should be impersonal, it has been held that the Court in its discretion

may appoint a relative of the witness as a witness of the adverse party to the proceeding. Lujan v. United States, 209 F. 2d 190, 192 (10th Cir. 1953).

Appellant does not rely on Ms. McCall's employment by a governmental agency because employment, absent a showing of actual bias or misconduct, is insufficient to establish prejudice. United States v. Lozarro, 511 F. 2d 1 (7th Cir. 1975); cert. denied, 423 U.S. 850 (1975).

However, appellant alleges specific instances of prejudice resulting in an abuse of discretion in appointing Ms. McCall as the interpreter. Chee v. United States, 449 F.2d 747 (9th Cir. 1971) (reversed on other grounds)

> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation. Federal Rules of Evidence, Rule 604.

In the case at bar there is evidence that the interpreter had a business and personal relationship with the witness, her translation was a constant source of controversy and her editorialization and attitude in violation of the Federal Rules of Evidence (Rule 604) served to deny the defendant a fair trial. Appeallant argues that the interpreter's personal and business relationships with the witness biased the defendant.

Appellant has met his burden in challenging the exercise of discretion of the District Court Judge in appointing

Joella McCall as interpreter by alleging specific instances of prejudice in addition to Ms. McCall's obvious status as an interested party in the outcome of the trial. Chee v. United States, 449 F 2d 747 (9th Cir. 1971) (reversed on other grounds).

POINT V:

THE ACCUMULATION OF ERRORS IN THE TRIAL BELOW DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

a) REVIEW OF THE TRIAL ERRORS

In the case at bar, the highly prejudicial lack of proper jury instructions as specifically mandated by the Second Circuit Court of Appeals, in United States v. Flores, 538 F.2d 939 (2nd Cir. 1976) clearly requires a reversal of the defendant's conviction.

The defendant was also denied a fair trial by a systematic pattern of Prosecutorial misconduct. Misconduct was clearly evidenced by the Prosecutor's improper introduction of the defendant's character into evidence; his improper comment concerning defense counsel and the failure of the Prosecutor to disclose to the defense the business and personal relationship between the Government's star witness, Rimbaud and the interpreter, Joella McCall.

The Prosecutor's comments and conduct must be viewed in the context of the entire trial. United States v. Grundberger, 431 F.2d 1062, 1069 (2nd Cir. 1970); United States v. Benter, 457 F.2d 1174, 1178 (2nd Cir. 1972), cert. denied, 409 U.S. 842 (1972); United States v. White, 486 F.2d 204, 207 (2nd Cir. 1973).

In the instant case the systematic pattern of prosecutorial misconduct warrants a reversal of the defendant's conviction.

The district judge erred in permitting Ms. McCall to act as the sworn interpreter in view of her relationship with Rimbaud. Defendant submits her entangled alliances with the Government's star witness, Rimbaud directly resulted in the numerous problems with her interpretation.

b) THE EFFECT OF THE TRIAL ERRORS

> Each case must be scrutinized on its particular facts to determine whether a trial error is harmless error when viewed in the light of the trial record as a whole, not whether each isolated incident viewed by itself constitutes reversible error. United States v. Grundberger, 431 F.2d 1062, 1069 (2nd Cir. 1970) United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

In United States v. Grundberger, supra, the cumulative effect of trial errors which included prosecutorial misconduct, insufficient evidence, and improper jury instructions, required a reversal of the defendant's conviction.

In United States v. Guglielmini, 384 F.2d 602 (2nd Cir. 1967); appeal after remand, 425 F.2d 439 (2nd Cir. 1970); cert. denied, 400 U.S. 820 (1970), the cumulative effect of trial errors required a reversal of the defendant's conviction. The errors complained of in Guglielmini were improper statements by the

trial judge, admission of irrelevant and prejudicial evidence, prosecutorial misconduct and a possibly confusing jury instruction. The court in United States v. Guglielmini, supra, held the above errors cumulatively cast such a serious doubt on the fairness of the trial as to require a reversal of the defendant's conviction.

It is respectfully argued that the accumulation of errors in the instant case makes it clear that the Prosecution was willing to stoop to utilization of any measures to obtain a conviction or their target, ANTONIO FLORES. Said actions were over-zealous and prejudicial and effectively denied ANTONIO FLORES a fair trial. The law is clear that, not only the individual defendant but the public at large is entitled to assurance that there shall be full observance and enforcement of the cardinal right of a defendant to a fair trial. United States v. Grundberger, 431 F.2d 1062 (2nd Cir. 1970).

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, THE JUDGMENT OF CONVICTION IN THE TRIAL BELOW SHOULD BE REVERSED, AND THE INDICTMENT DISMISSED, OR, IN THE ALTERNATIVE, THIS COURT SHOULD ORDER A REMAND FOR A NEW TRIAL WITH PROPER JURY INSTRUCTIONS.

Respectfully Submitted,

STUART R. SHAW
ATTORNEY FOR DEFENDANT-
APPELLANT FLORES
600 MADISON AVENUE
NEW YORK, N.Y. 10022
(212) 755-5645

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

MARIA RISSO, being duly sworn, deposes and says: that deponent is not a party to this action is over 18 years of age and resides at 432 Olmstead Avenue, Bronx, New York. That on February 22, 1977 at P.M. deponent served the within Appellant's Brief and Appellant's Appendix by delivering true copies of each on the below named personally:

Original and seven copies on:

Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

and

one copy of each of the above named Brief and Appendix on:

HON. ROBERT B. FISKE, JR.
U.S. Attorney's Office SDNY
U.S. Courthouse Annex
One St. Andrew's Plaza
New York, New York
Attn: AUSA John Flannery.

Maria D. Risso
MARIA RISSO

Sworn to before me this
22nd day of February, 1977.

Murray Padgug
Notary Public

MURRAY PADGUG
Notary Public, State of N. Y.
No. 30-2994400 Nassau County
Comm. Exp. March 30, 1977